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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1320

SAM MILLARD,

Petitioner,

versus

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JOHN W. HARRELL,
Counsel for Petitioner;
P. M. FLANAGAN,
Of Counsel for Petitioner.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1320

SAM MILLARD,

versus *Petitioner,*

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Supreme Court of the United States:

Your petitioner, Sam Millard, respectfully shows:

I

Summary Statement of the Matters Involved

That he was convicted in the United States District Court for the Eastern District of Louisiana, New Orleans Division, on October 5, 1944, upon thirteen counts of a nineteen count information. Counts 1 to 11 inclusive charged the selling of tires without ration certificates in violation of Section 1315.801 of Ration Order I-A, as amended, and Section 2 (a) (5) of the Priorities and Allocations Act, as amended by the

Second War Powers Act; Counts 12 to 19 inclusive charged the sale of tires in excess of the maximum price in violation of Sections 4 (a) and 205 (b) of the Emergency Price Control Act of 1942, as amended, and Revised Price Schedule Number 63 (R. 2-24). However, paragraphs 1 and 2 of Count 1, which were referred to and incorporated in all subsequent counts, charged a violation of the following laws:

1. Priorities and Allocations Act approved June 28, 1940, Title 50, U. S. C. A. Appendix Sec. 1152, as amended by

2. Second War Powers Act of 1942, Title 50, U. S. C. A. Appendix Sec. 633;

3. War Production Board Directive No. 1, approved by President on January 24, 1942, 7 Fed. Reg. 562 (Vol. 7, No. 19);

4. War Production Board Supplementary Directive No. 1 (q) 7 Fed. Reg. 9121 (Vol. 7, No. 221);

5. Ration Order 1 A;

6. Emergency Price Control Act of 1942, Title 50, U. S. C. A. Appendix Secs. 901, et seq., and

7. Revised Price Schedule No. 63.

Petitioner was convicted on counts 2, 3, 4, 5, 6, 7, 8, 9, 10, 13, 17, 18 and 19 (R. 36).

Petitioner was sentenced to pay a fine of $200.00 on each of the above counts, and additionally imprisoned to one (1) year as to Counts 2 and 13; one (1) year as to Count 3; one (1) year as to Counts 4, 5, 6 and 7; one (1) year as to Counts 8, 9 and 10 and one (1) year as to Counts 17, 18 and 19 (R. 43-45). In other words, petitioner was sentenced to pay a fine of $2600.00 and to serve five (5) years for violations of a misdemeanor.

A demurrer was filed on September 23, 1944, to the information, setting forth that each and every count was bad for duplicity, and that each count did not state facts or grounds sufficient to constitute a crime against the United States. The third ground of the demurrer was abandoned (R. 25).

On the same date a motion to quash was filed stating as grounds that each and every count was bad for duplicity, and that each and every count of the information was vague, indefinite, and uncertain, and did not fully inform the defendant of the charges made against him; because in each count the allegations of fact necessary to constitute a crime were insufficient, uncertain, and ambiguous; and because each count was not sufficient in form or substance to plead the judgment in bar in another prosecution for the same offense (R. 26).

A motion for a bill of particulars was also filed (R. 27).

On the hearing of the demurred, motion to quash and bill of particulars, all were overruled except the Government was permitted to amend Counts 17, 18 and 19 and certain information was furnished in response to the bill of particulars (R. 29). Counts 17, 18 and 19 were amended to substitute the words "Maximum Price Regulation Number 528" for the words "Revised Price Schedule Number 63" (R. 30).

Immediately before the trial the Court refused to allow your petitioner to withdraw his plea of not guilty for the purpose of permitting the filing of a motion for a bill of particulars, a demurrer and a motion to quash the amended bill of information, which were based on the same grounds as the original motions.

A motion in arrest of judgment was filed on the grounds that the amended information did not state facts sufficient to constitute a crime against the United States; that the counts of the amended information were insufficient in

charging the commission of a criminal act in that the Second War Powers Act of 1942 and the Emergency Price Control Act of 1942, were unconstitutional, and that petitioner should have been allowed to withdraw his plea of not guilty for the purpose of filing a motion for a bill of particulars, a demurrer and a motion to quash the amended information (R. 40).

The motion in arrest of judgment was overruled by the trial Court and exception was duly taken (R. 43).

Thereafter, on the 11th day of October, 1944, petitioner gave notice of appeal under Rule 3 (R. 46) setting forth the grounds of appeal (R. 48), and thereafter filed his appeal bond (R. 49).

On March 29, 1945, the appellate court affirmed the judgment of the trial court (R. 64), pursuant to a written opinion, which is not yet reported (R. 60-64). Petition for rehearing was duly filed on April 17, 1945 (R. 65). Order denying petition for rehearing was entered by the Fifth Circuit Court of Appeals on May 4, 1945 (R. 68). Motion for stay of mandate was duly filed by petitioner on May 7, 1945, and order granting the same for a period of thirty days from May 4, 1945, was entered by the Circuit Court of Appeals on May 9, 1945.

The specifications of errors and points relied upon in the appeal from the trial Court to the Fifth Circuit Court of Appeals, and herein involved, are as follows:

1. *The overruling of the demurrer.*

2. *The overruling of the motion to quash.*

3. *The refusal to allow petitioner to withdraw plea of not guilty immediately before the trial for the purpose of permitting the filing of a motion for a bill of particulars, a demurrer and a motion to quash the amended bill of information.*

4. *The overruling of the motion in arrest of judgment, in which the constitutionality of the Second War Powers Act of 1942 and the Emergency Price Control Act of 1942 was attacked; and*

5. *The invalidity of the sentence.*

II

Reasons Relied On for the Allowance of the Writ

1. The decision of the Circuit Court of Appeals herein involves an important question of Federal Law which is in conflict with the decisions of this Court.

2. Such decision of the Circuit Court of Appeals is an untenable decision of an important question of Federal Law.

3. Such decision involves an important question of Federal Law which has not been specifically decided by this Court but should be so settled.

Petitioner presents to this Court, and files herewith as an exhibit hereto, a duly certified transcript of the entire record in the case, as the same appears in the Circuit Court of Appeals.

WHEREFORE, petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its docket, No. 11,183, Sam Millard, Appellant, versus United States of America, Appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that

the judgment herein of said Circuit Court of Appeals be reversed by this Court, and for such further relief as to this Court may seem proper.

New Orleans, La., May —, 1945.

SAM MILLARD,
Petitioner,

By JOHN W. HARRELL,
of New Orleans,
Counsel for Petitioner;

P. M. FLANAGAN,
of New Orleans,
of Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1320

SAM MILLARD,

Petitioner,

versus

THE UNITED STATES OF AMERICA

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

May It Please the Court:

I

Opinions of Courts Below

The opinion of the Circuit Court of Appeals for the Fifth Circuit, dated March 29, 1945 (R. 60-64), is not yet reported.

II

Jurisdiction

The statutory provision which is believed to sustain the jurisdiction of this Court is Section 240 of the Judicial Code, as amended (28 U. S. C. A. 347).

III

Statement of the Case

This has already been stated in the preceding petition under Paragraph I thereof, which is hereby adopted and made a part of this brief.

IV

Specification of Errors

The Circuit Court of Appeals erred as follows:

1. In failing to hold that each and every count of the said information was bad for duplicity, in that more than one crime was charged in each of said counts.

2. In failing to hold that the information did not state facts or grounds sufficient to constitute against petitioner a crime against the United States.

3. In failing to hold that each and every count of the said information was vague, indefinite, and uncertain, and did not fully inform petitioner of the charges made against him; because in each count the allegations of fact necessary to constitute a crime were insufficient, uncertain, and ambiguous; and because each count was not sufficient in form or substance to plead the judgment in bar of another prosecution for the same offense.

4. In failing to hold that petitioner should have been allowed to withdraw his plea of not guilty immediately before the trial for the purpose of permitting the filing of a motion for a bill of particulars, a demurrer and a motion to quash the amended bill of information.

5. In failing to pass on petitioner's motion in arrest of judgment, in which the constitutionality of the Second War

Powers Act of 1942 and the Emergency Price Control Act of 1942 was attacked.

6. In failing to express an opinion as to whether petitioner could be confined in a penitentiary, inasmuch as he was sentenced for violations of a misdemeanor.

V

Argument

A more concise or better argument as to *specification of errors 1, 2, and 3* than was advanced to the Circuit Court of Appeals cannot be urged and it is therefore restated herein.

Duplicity is the joining in one count of two or more distinct offenses. The first count in paragraphs 1 and 2 sets out the various statutes violated. In all of the other counts the allegations contained in paragraphs 1 and 2 of Count 1 were incorporated, in the following language:

> "That all the allegations contained in paragraphs 1 and 2 of Count 1 of this information are, and at the times herein alleged, were true, and said Count 1 as to said allegations is hereby referred to and made a part hereof as if set out at length herein:"

The following identical language is used in all of the counts:

> "* * *, one Sam Millard, whose full name is otherwise unknown to your information, hereinafter called 'defendant', being then and there a retail dealer in automobile and truck tires and tubes, operating an establishment at which automobile and truck tires and tubes were sold to consumers in the regular course of business, did knowingly, wilfully and unlawfully *sell, transfer, and deliver* to * * *"

Counts 1 to 11 then follow with:

"without having demanded and received of the said * * * in exchange for said tire a certificate issued by the local, etc.,"

Counts 12 to 19 then follow with:

"at a price in excess of and higher than the maximum price fixed and established by Revised Price Schedule No. 63, etc.,"

Counts 1 to 11 end with the following language:

"* * * against the peace and dignity of the United States and contrary to the form of the statute in such case made and provided, and especially Section 1315.801 of Ration Order 1-A as amended and Section 2 (a) (5) of the Priorities and Allocations Act, as amended by the Second War Powers Act."

Section 1315.801 of Ration Order 1-A reads:

"Notwithstanding the terms of any contract, agreement or other obligation, regardless of when made, no person, unless permitted by Ration Order No. 1A, or by an order, authorization or regulation issued by the War Production Board, shall:

(a) Make or offer to make, accept or offer to accept, or solicit a transfer of any tire, new tube or camelback; or

(b) Use, alter or change the physical location of any tire, new tube or camelback; or

(c) Mount any tire or new tube upon a wheel or rim."

Counts 12 to 19 end with the following language:

"* * * against the peace and dignity of the United States and contrary to the form of the statute in such case made and provided, and especially Section 4 (a) and 205 (b) of the Emergency Price Control Act of 1942, as amended, and Revised Price Schedule Number 63."

Section 1315.101 of Revised Price Schedule No. 63 reads as follows:

> "Maximum retail prices. On and after January 5, 1942, regardless of the terms of any contract of sale or other commitment, no person shall *sell, offer to sell, deliver or* transfer at retail, any new rubber tire or tube, at prices higher than the maximum prices set forth in Appendices A and B hereof, incorporated herein as 1315.110 and 1315.111."

Regulation No. 63 was revoked April 20, 1944, effective May 1, 1944.

As to Counts 17, 18 and 19, which were amended to substitute MPR 528 for Revised Price Schedule 63, we quote below the applicable language of Sec. 2 of Part 1315 of MPR 528, the effective date of which was April 20, 1933:

> "Sec. 2. Prohibition against dealing in tires and tubes, recapping and repairing at prices above the maximum. On and after the effective date of this regulation, no person shall *sell or deliver,* or recap or repair any tire or tube, and no person shall buy or receive any tire or tube or any recapping or repairing service in the course of trade or business, at a price higher than the maximum price fixed by this regulation, regardless of any contract or other obligation, * * *".

Section 4 (a) of the Emergency Price Control Act of 1942 reads in part as follows:

> "It shall be unlawful, regardless of any contract, agreement, lease or other obligation heretofore or hereafter entered into, for any person to *sell or deliver* any commodity, or in the course of trade or business to buy or receive any commodity, * * *."

From a careful comparison and analysis of the language contained in the various acts and orders quoted above, petitioner contends that two distinct offenses were joined,

namely, the transfer of tires and the sale of tires. This position is strengthened by the incorporation in each count of the allegations of Paragraphs 1 and 2 of Count 1 of said information.

The penalty under the Priorities and Allocations Act as amended by the Second War Powers Act of 1942 is $10,000.00 or one (1) year or both; a similar penalty is prescribed by Ration Order 1A. The penalty prescribed by the Emergency Price Control Act of 1942 is $5,000.00 or one (1) year or both, and it is clear that Congress is prescribing different penalties intended that the offenses be distinct. A tire can be transferred without being sold, but we doubt that a tire could be sold without being transferred. We believe this case in principle is analogous to that of *Creel* v. *United States*, (C. C. A. 8), 21 F. (2d) 690.

This Court in the case of *United States* v. *L. Cohen Grocery Company*, 255 U. S. 81, 65 L. Ed. 510, upheld the doctrine that Courts when called upon to apply criminal sanctions has the power to determine whether the indictment before it is sufficiently definite in its charges.

The information we suggest is highly conglomerated, and we believe it justifies the definition Webster has given said word, to-wit: "*That which is compacted or massed together from various sources.*"

Where is the language "sell, transfer and deliver" used in Counts 1 to 11 inclusive to be found? The answer seems to be in Section 1315.101 of the Revised Price Schedule No. 63 and in Section 4 (a) of the Emergency Price Control Act of 1942, the pertinent portions of which we have quoted above. These laws would seem to apply to the violations alleged in Counts 12 to 19 inclusive. Yet the identical language is used in all of the counts. Certainly this language is not found in Ration Order 1A, or in the Second War Powers Act of 1942.

Potter v. *U. S.*, 155 U. S. 438, 39 L. Ed. 214, 15 S. Ct. 144, is to the effect that it is sufficient and usual to follow the statutory language if it contains all that is essential to constitute the crime and apprise the defendant of the nature of the offense charged. In Counts 1 to 11 inclusive the statutory language is not even used. While we realize the complexities attendant upon a study of the maze of the acts, orders and regulations involved, as evidenced by Paragraphs 1 and 2 of Count 1, we cannot but help conclude that the pleader took the easy way out in drafting the information. In Paragraphs 1 and 2 of Count 1 he set out every conceivable law, order and regulation. He then incorporates this in every count by reference; he uses the identical language in every count, adding in Counts 1 to 11 that the *sale, transfer and delivery* was without a certificate, and in Counts 12 to 19 that the *sale, transfer and delivery* was above the maximum price.

As to Counts 12 to 19 there are a number of reasons why they do not set out facts and grounds sufficient to state an offense against the United States. Section 1315.101 of Revised Price Schedule No. 63 states "no person shall sell, offer to sell, deliver or transfer *at retail* * * *." While all of the counts state the defendant was a retail dealer, they did not allege specifically that the tires were sold at retail.

Was Revised Price Schedule No. 63 issued pursuant to an existing authority? We think not, in spite of the fact the information so states it was issued pursuant to the Emergency Price Control Act of 1942, approved January 30, 1942. Revised Price Schedule No. 63 was issued on December 21, 1941, effective January 5, 1942, which was prior to the approval of the Emergency Price Control Act.

As to specification of error No. 4. On September 27, 1944, Counts 17, 18 and 19 were amended to substitute the

words "Maximum Price Regulation Number 528", for the words "Revised Price Schedule Number 63". While an information may be amended in form or substance, the amendment makes it in effect a new information, the original one being *ipso facto* deemed abandoned and set aside. *Ex Parte Bain*, 121 U. S. 1, 30 L. Ed. 849, 7 S. Ct. 781; *Armstrong* v. *U. S.* (C. C. A. 9), 16 F. (2d) 62. Paragraphs 1 and 2 of Count 1 were not amended, and inasmuch as Counts 17, 18 and 19 incorporated these two paragraphs, it is clear that said counts did not set forth an offense.

In any event, the information was in effect a new one and your petitioner should have been given an opportunity to avail himself of the defense he originally had. Certainly if a new indictment had been returned, petitioner would have had to go through the additional process of attacking the new indictment, and the denial of this right under the amended information was a denial of a substantive right.

Specification of error No. 5. The Circuit Court of Appeals completely ignored the Specification of Error as to the overruling of the motion in arrest of judgment, in which the constitutionality of the Second War Powers Act of 1942 and the Emergency Price Control Act of 1942, was attacked (R. 40-41). We are familiar with the cases decided by this Court, namely, *Yakus* v. *United States*, 321 U. S. 417, 64 S. Ct. 660; *Bowles, Administrator*, v. *Willingham, et al.*, 321 U. S. 503, 64 S. Ct. 641. However, we can find no cases which have specifically passed upon all phases as outlined in petitioner's motion in arrest of judgment. We believe it of national importance that these specific points be decided.

Specification of error No. 6. The laws violated are misdemeanors, not felonies. However, petitioner received an aggregate of five (5) years and he should be informed as to

whether he has to serve this sentence in a penitentiary, should this writ be denied.

Conclusion

This case is therefore one calling for the exercise by this Court of its supervisory powers through the granting of a writ of certiorari, followed by a review and reversal of said decision of the Circuit Court of Appeals.

Respectfully submitted,

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Of New Orleans,
Counsel for Petitioner;
P. M. FLANAGAN,
Of New Orleans,
Of Counsel for Petitioner.



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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1320

SAM MILLARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 60–64) is reported at 148 F. 2d 154.

JURISDICTION

The judgment of the circuit court of appeals was entered March 29, 1945 (R. 64), and a petition for rehearing (R. 65–67) was denied May 4, 1945 (R. 68). The petition for a writ of certiorari was filed May 28, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also, Rules XI and XIII of

the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

The principal question presented is whether the information is bad on the grounds either that it fails to state any offense against the United States or that each count is duplicitous or indefinite and uncertain.

STATUTES AND REGULATIONS INVOLVED

Section 2 (a) of the Act of June 28, 1940 (54 Stat. 676), as amended by the Act of May 31, 1941 (55 Stat. 236), and by Title III of the Second War Powers Act of March 27, 1942 (56 Stat. 177), 50 U. S. C. App., Supp. III, 633, provides in part:

> (2) * * * Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.
>
> * * * * *
>
> (5) Any person who willfully performs any act prohibited, or willfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation,

or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both.

* * * * *

(8) The President may exercise any power, authority, or discretion conferred on him by this subsection (a), through such department, agency, or officer of the Government as he may direct and in conformity with any rules or regulations which he may prescribe.

The Emergency Price Control Act of 1942, 56 Stat. 23, as amended, 50 U. S. C. App., Supp. III, 901 *et seq.*, provides in pertinent part:

SEC. 2. (a) Whenever in the judgment of the Price Administrator * * * the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and effectuate the purposes of this Act. * * *.

* * * * *

SEC. 4. (a) It shall be unlawful * * * for any person to sell or deliver any commodity, * * * in violation of any regulation or order under section 2 * * *.

* * * * *

SEC. 205. * * * (b) Any person who willfully violates any provision of section

> 4 of this Act * * * shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) and for not more than one year in all other cases, or to both such fine and imprisonment. * * *

Ration Order No. 1A (7 F. R. 9160), issued by the Office of Price Administration on November 6, 1942, pursuant to the authority of Section 2 (a) (2) and (8) of the Act of June 28, 1940, as amended (*supra*), provided in pertinent part as of the date of the offenses involved here:

> § 1315.801 [as amended, 8 F. R. 16246] *Prohibitions*—(a) *General prohibition.*—notwithstanding the terms of any contract, agreement or other obligation, regardless of when made, no person, unless permitted by Ration Order No. 1A, or by an order, authorization or regulation issued by the War Production Board, shall:
>
> (1) Make or offer to make, accept or offer to accept, or solicit a transfer of any tire or new tube.
>
> * * * * *

Revised Price Schedule No. 63, issued December 30, 1941 (7 F. R. 35), provided in pertinent part:

> SEC. 1315.101 [as amended, 8 F. R. 12335] *Prohibition against dealing in new rubber tires and tubes at prices above the maximum.*—On and after January 5, 1942, regardless of any contract, agreement, lease or other obligation, no person shall sell or deliver new rubber tires or tubes at

> retail prices higher than the maximum prices; * * *.

Maximum Price Regulation No. 528, issued April 20, 1944 (9 Fed. Reg. 4291), which superseded Revised Price Schedule No. 63 (*supra*), provides in part:

> SEC. 2. *Prohibition against dealing in tires and tubes, recapping and repairing at prices above the maximum.*—On and after [May 1, 1944] no person shall sell or deliver * * * any tire or tube * * * at a price higher than the maximum price fixed by this regulation, regardless of any contract or other obligation. * * *

STATEMENT

On August 30, 1944, an information in nineteen counts was filed against petitioner in the United States District Court for the Eastern District of Louisiana (R. 2–24). Counts 1 through 11 each charged that petitioner, a retail dealer in automobile and truck tires and tubes, wilfully transferred to a named person described tires or tubes without demanding or receiving from the transferee a certificate issued by a War Price and Rationing Board authorizing the transfer, as required by Ration Order IA, in violation of the Second War Powers Act (R. 2–15). Counts 12 through 19 each charged that he wilfully transferred to a named person described tires or tubes at prices in excess of those prescribed by Revised Price Schedule No. 63, in violation of the Emer-

gency Price Control Act of 1942 (R. 15–24).[1] At his jury trial, the Government dismissed counts 11, 14, 15, and 16 at the close of its case (R. 35), and petitioner rested without offering any evidence (R. 35). The jury returned a verdict of guilty on all the remaining counts except the first and twelfth (R. 36). Petitioner was sentenced to pay a fine of $200 on each count, "said defendant [to] be imprisoned until payment of said fines, or until said defendant is otherwise discharged as provided by law" (R. 44); to imprisonment for one year on counts 2 and 13, the sentence to commence "only at and from the termination of the commitment" in respect of the fines; and to consecutive terms of imprisonment for one year on count 3, counts 8, 9 and 10, counts 17, 18 and 19, and counts 4, 5, 6 and 7, making a total of five years (R. 44–45).

On appeal to the Circuit Court of Appeals for the Fifth Circuit, the court, to avoid indefiniteness as to when the first imprisonment sentence should begin to run, construed the judgment "as requiring the service of the first prison sentence to commence from the date on which the defendant is received at the penitentiary, reformatory or jail

[1] Revised Price Schedule No. 63 was superseded by Maximum Price Regulation No. 528 on May 1, 1944, and prior to trial counts 17, 18, and 19, which related to transactions after May 1, 1944, were amended to substitute the latter as the governing regulation (R. 30–32). So far as is here material the provisions of both regulations were the same. (See pp. 10–11, *infra*.)

for the service of his sentence" (R. 63–64), and otherwise affirmed the judgment (R. 64).

ARGUMENT

1. Petitioner does not challenge the sufficiency of the evidence to support the verdict of the jury, nor does he claim that any error was committed in the trial. Rather, his principal contention is that the information is bad on the somewhat inconsistent grounds that no offense is alleged and that each count is duplicitous. Additionally, he urges that the information is "vague, indefinite, and uncertain." (Pet. 8–13.) We believe that a mere reading of the information shows that these contentions are without merit.

As preliminary matters, the prosecuting attorney set forth in paragraph 1 of count 1 the various statutes, directives, and regulations relating to those counts charging violations of Ration Order 1A; paragraph 2 sets forth the provisions relating to those counts charging violations of the price orders. Then, in the charging part of count 1, it is alleged that on or about April 15, 1944, at New Orleans, petitioner, a retail dealer in tires and tubes, willfully did "sell, transfer, and deliver to one Louis Garner, one new Hood White Arrow Extra Service Four-Ply Automobile Tire Size 6.00 x 16, bearing Serial Number 5102503112–3," without having demanded or received a certificate issued by a War Price and Rationing Board authorizing such a transfer, as required by Ration

Order 1A, and without being otherwise permitted to do so by the ration order, in violation of Section 1315.801 of the order and Section 2 (a) (5) of the Priorities and Allocations Act, as amended by the Second War Powers Act (R. 2–4). The allegations in the other counts are substantially the same, with the exception that counts 12 through 19, instead of alleging violations of the ration order, charge that the tires described therein had been sold for prices in excess of the maxima fixed by the applicable price orders, in violation of the Emergency Price Control Act of 1942. Plainly, petitioner was fully advised of the charges against him, for the allegations are neither vague nor uncertain. Each count recites the date of the transaction, the description of the tires or tubes involved, the manner in which there was a failure to comply with the requirements of the applicable ration or price order, and the statute violated. It is difficult to perceive what further allegations could have been made to inform petitioner more fully of the offenses charged against him. Similarly, there can be no question that each count alleges an offense against the United States. It cannot be disputed that willfully to sell a new tire at a price in excess of the maximum fixed by a price order is a violation of the Emergency Price Control Act, and that willfully to sell a tire to a person not authorized to acquire one under the rationing regulations is a violation of the Second War Powers Act. That

each count clearly alleged one of these offenses is hardly debatable.

The sole basis for petitioner's argument that the counts are duplicitous is that each alleged that petitioner did willfully "sell, transfer, and deliver" a tire under circumstances proscribed by a specified order of the Price Administrator. In petitioner's view each of the quoted words describes a separate offense. It is clear, however, that the offense involved in each of the first 11 counts is a violation of the Second War Powers Act (*supra,* pp. 2–3) in that petitioner willfully performed an act prohibited by a regulation issued pursuant to that statute. A similar offense, proscribed by Section 205 (b) of the Emergency Price Control Act, is the crime described in each of counts 12 through 19. The words "sell," "transfer," and "deliver" do not describe different offenses; they merely designate the different means by which the offenses charged were committed. Thus, for example, Section 1315.801 of Ration Order 1A proscribes the "transfer" of a tire or tube in violation of the order, and Section 1315.201 (a) (35) defines "transfer" as "any change in right, title, interest, possession or control, including, but not limited to, sale, purchase, lease, loan, trade, exchange, gift, delivery, shipment, and hypothecation." As this Court said in *Crain* v. *United States,* 162 U. S. 625, 636:

> We perceive no sound reason why the doing of the prohibited thing, in each and

> all of the prohibited modes, may not be charged in one count, so that there may be a verdict of guilty upon proof that the accused had done any one of the things constituting a substantive crime under the statute.

To the same effect, see *Blain* v. *United States*, 22 F. 2d 393 (C. C. A. 8); *Malaga* v. *United States*, 57 F. 2d 822, 825 (C. C. A. 1); *United States* v. *Delaware, L. & W. R. Co.*, 152 Fed. 269 (C. C. S. D. N. Y.).

2. Eight days before the trial commenced the Government, with leave of court (R. 30–32), amended counts 17, 18, and 19 to recite that Maximum Price Regulation No. 528, rather than Revised Price Schedule No. 63, was the governing regulation. This was occasioned by the fact that on May 1, 1944, the latter price schedule was superseded by the former and that counts 17, 18, and 19 related to transactions after May 1, 1944. Petitioner urges (Pet. 13–14) that this amendment made the information a new one and that he was therefore entitled to interpose *de novo* his demurrer and motion to quash which previously had been denied. We submit that the amendment was hardly one of such substance as to be regarded as a withdrawal of the earlier information and the filing of a new one, thereby commencing the entire proceeding anew. But even if that be assumed, we are unable to understand how petitioner would have been prejudiced by the

trial court's failure to permit him to reassert a challenge to the information which previously had been fully considered and rejected (See R. 25–27, 29–30, 38–40). Obviously, the substitution of the words "Maximum Price Regulation No. 528" for "Revised Price Schedule Number 63" did not change in any respect the considerations involved in the court's earlier denial of the demurrer and motion to quash. At best, to have permitted petitioner to reassert his challenge would have been to permit him to do a useless act. In such a situation, the trial court plainly is not chargeable with an abuse of discretion.

3. Finally, petitioner urges (Pet. 14), without supporting argument, that the Emergency Price Control Act and the Second War Powers Act are unconstitutional on the ground that they delegate legislative power, that they are in violation of the Fourth and Fifth Amendments, that they are unconstitutional attempts to regulate intrastate commerce, and that they are improper exercises of the war power (see R. 40–41). Petitioner does not elucidate the grounds upon which he predicates these conclusions. We believe that the contention is without merit in view of the decisions in *Yakus* v. *United States,* 321 U. S. 414, and *Bowles* v. *Willingham,* 321 U. S. 503. Cf. *Steuart & Bro.* v. *Bowles,* 322 U. S. 398. See also, e. g., *Taylor* v. *United States,* 142 F. 2d 808 (C. C. A. 9); *O'Neal* v. *United States,* 140 F. 2d 908 (C. C. A. 6), certiorari denied, 322 U. S. 729;

Taylor v. *Brown*, 137 F. 2d 654 (Em. Ct. App.), certiorari denied, 320 U. S. 787; *Brown* v. *Wright*, 137 F. 2d 484 (C. C. A. 4); *Brown* v. *Warner Holding Co.*, 50 F. Supp. 593 (D. Minn.).[2]

CONCLUSION

The decision below is correct. The case presents no conflict of decisions or unsettled question of importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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JUNE 1945.

[2] Petitioner suggests (Pet. 13) doubt as to the validity of Revised Price Schedule No. 63, because it was promulgated December 21, 1941, prior to the enactment of the Emergency Price Control Act of 1942. Section 206 of the Act expressly provides, however, that "Any price schedule establishing a maximum price or maximum prices, issued by the Administrator of the Office of Price Administration or the Administrator of the Office of Price Administration and Civilian Supply, prior to the date upon which the Administrator provided for by section 201 of this Act takes office, shall, from such date, have the same effect as if issued under section 2 of this Act until such price schedule is superseded by action taken pursuant to such section 2." The price ceiling violation alleged in count 13, the only one of the counts based on Regulation 63 upon which petitioner was convicted (see pp. 5–6, 10, *supra*), occurred after the enactment of the Emergency Price Control Act of 1942 (R. 15–20).

U. S. GOVERNMENT PRINTING OFFICE: 1945